

No. 76373-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of  
  
KSENIIA GOLUBEVA,  
  
Respondent  
  
and  
  
EVGENY PISTRAK,  
  
Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY

THE HONORABLE MARY E. ROBERTS  
No. 15-3-06019-1 SEA

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BRIEF OF APPELLANT

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By: Evgeny Pistrak  
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## Table of Contents

I. INTRODUCTION .....	vi
II. ASSIGNMENTS OF ERROR.....	vii
Assignment of Error .....	vii
Issues Pertaining to Assignment of Error .....	viii
III. STATEMENT OF THE CASE .....	1
IV. SUMMARY OF ARGUMENT.....	5
V. LEGAL ARGUMENT .....	6
A. The Trial Court Abused Its Discretion In Awarding Wife Maintenance Based Only On Wife's Visa Status Without Fairly Considering Other Factors.....	6
B. Substantial Evidence Does Not Support The Trial Court's Findings That Wife Has The Need Or That Husband Has The Ability To Pay.....	12
C. The Trial Court Erred in Entering an Award of Attorney's Fee Without Including Appropriate Findings and Conclusions in the Record. ....	15
D. The Trial Court Abused Its Discretion When It Entered A Finding That The Husband's Need For An Interpreter Was Not Credible.....	21
CONCLUSION.....	24

## Table of Authorities

### Cases

<i>Allard v. First Interstate Bank of Wash.</i> , 112 Wn.2d (1989).....	20
<i>American Nursery v. Wells</i> , 115 Wn.2d 217, 234, 797 P.2d 4 77 (1990) .....	15
<i>Berryman v. Farmers Ins. Co.</i> , 179 Wn.2d 1026, 320 P.3d 718 (2014) .....	16
<i>Berryman v. Metcalf</i> , 177 Wn. App. 644, 658, 312 P.3d 745 (2013), review denied sub nom.....	16
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 597, 675 P.2d193 (1983) .....	15
<i>Burrill</i> , 113 Wn. App. at 873 (2002).....	18
<i>Eagle Point Condominium Owners Ass'n. v. Coy</i> , 102 Wn. App. 697, 715, 9 P.3d 898 (2000).....	16
<i>In re Marriage of Bernard</i> , 165 Wn.2d 895, 903, 204 P.3d 907 (2009).....	22
<i>In re Marriage of Bowen</i> , 168 Wn. App. 581, 586-87, 279 P.3d 885, review denied, 176 Wn.2d 1009 (2012) .....	21
<i>In re Marriage of Bulicek</i> , 59 Wn. App. 630, 633, 800 P.2d 394 (1990) .....	7
<i>In re Marriage of Crosetto</i> , 82 Wn. App. 545, 558, 918 P.2d 954 (1996) .....	6
<i>In re Marriage of Foley</i> , 84 Wn. App. 839, 846-47, 930 P.2d 929 (1997) .....	20

<i>In re Marriage of Greene</i> , 97 Wn. App. 708, 714, 986 P.2d 144 (1999) .....	12
<i>In re Marriage of Irwin</i> , 64 Wn. App. 38, 55, 822 P.2d 797 (1992).....	8
<i>In re Marriage of Khan</i> 182 Wn. App. 795; 332 P.3d 1016 (2014).....	8
<i>In re Marriage of Knight</i> , 75 Wn. App. 721, 729, 880 P.2d 71 (1994).....	19
<i>In re Marriage of Luckey</i> , 73 Wn. App. 201, 209, 868 P.2d 189 (1994) .....	8
<i>In re Marriage of McDole</i> , 122 Wn.2d 604,610,859 P.2d 1239 (1993).....	12
<i>In re Marriage of Muhammad</i> , 153 Wn.2d 795, 803, 108 P.3d 779 (2005) .....	21
<i>In re Marriage of Spreen</i> , 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001) .....	8
<i>In re Marriage of Zahm</i> , 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999) .....	6
<i>Johnson v. Horizon Fisheries, LLC</i> , 148 Wn. App. 628, 640, 201 P.3d 346 (2009) .....	12
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998).....	16
<i>Mayer v. City of Seattle</i> , 102 Wn. App. 66, 81, 10P .3d 408 (2000), review denied, 142 Wn.2d 1029, 21P.3d 1150 (2001).....	15
<i>Mayer v. City of Seattle</i> , 102 Wn. App. 66, 82-83 (2000).....	16
<i>Mowat Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 148 Wn. App. 920, 925, 201 P.3d 407 (2009) .....	12

<i>Pham v. City of Seattle</i> , 159 Wn.2d 527, 539-40, 151 P.3d 976 (2007) .....	17
<i>Scott Fetzer Co., Kirby Co., Div. v. Weeks</i> , 114 Wn.2d 109, 124, 786 P.2d 265 (1990).....	16
<i>West v. Port of Olympia</i> , 146 Wn. App. 108, 123, 192 P.3d 926 (2008) .....	17

## **Statutes**

<i>RCW 2.43.030(1)</i> .....	22
<i>RCW 26.09.090</i> .....	7

## **Other Authorities**

<i>Washington Family Deskbook</i> , Volume 2, §32.3(5), 32-17 .....	14
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## **Rules**

<i>RPC 1.5(a)</i> .....	20
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## **I. INTRODUCTION**

A genuine marriage, cohabitation, comingling of resources, shared goals and efforts and raising children necessarily entangles the two individuals. A shared long-term life together often means specialization and division of responsibilities within the relationship, which works well for the family as a unit but may leave individuals in different financial and social circumstances should one or both of them choose to part and dissolve the marriage.

On the other hand, short-term marriages and especially very short marriages, which end only months after they began, do not have the same effect on the lives of the two persons involved. In such cases, Washington Courts have customarily ruled to return the parties to the same economic conditions they enjoyed at the inception of the marriage.

Length of marriage must be considered by the Court when ruling on the issues of maintenance and property. Failure to make a distinction between short and long-term marriages creates a legal loophole which can be abused to transfer the separate assets of

one spouse to another in a community which failed to thrive. This case is an instance of such abuse.

The husband appeals the trial Court's ruling awarding 13 month of maintenance of \$2,000 per month to wife after 8 months of marriage, and the award of excessive attorney fees of \$20,000.

## **II. ASSIGNMENTS OF ERROR**

### **Assignment of Error**

1. The trial Court erred in failing to consider all statutory factors in determining the length and amount of spousal maintenance.
2. The trial Court erred in failing to consider husband's net income, debt and expenses when making the determination of need and ability to pay.
3. The trial Court erred in failing to apply the lodestar methodology and RPC 1.5(a) guidelines when determining the amount of reasonable attorney fees.
4. The trial Court erred in not providing an interpreter to husband during the ruling on the case on November 18, 2016.

### **Issues Pertaining to Assignment of Error**

1. Did the trial court abuse its discretion when it awarded pre-trial maintenance on revision based only on the wife's visa status limitations? (Assignment of Error 1)
2. Did the trial court abuse its discretion in failing to make a finding of husband's credit card debt, net income and expenses? Does the record contain substantial evidence to support the court's finding of need and ability to pay? (Assignment of Error 2)
3. Did the trial court abuse its discretion in failing to apply lodestar methodology and RPC 1.5(a) guidelines when calculating the amount of reasonable attorney fees? Did the trial court develop a record adequate for review of award of attorney fees? (Assignment of Error 3)
4. Did the trial Court err as a matter of law when it did not provide an interpreter on the day of ruling? Did the trial court abuse its discretion in entering a finding that the husband's need for an interpreter was not credible? (Assignment of Error 4)



### **III. STATEMENT OF THE CASE**

Appellant Evgeny Pistrak, age 37, and respondent Kseniia Golubeva, age 31, were married on September 19, 2014 at the Consulate General of the Russian Federation in Seattle located at 600 University Street Room #2510, One Union Square (EX 129, RP 347, CP 73). The parties have no children (CP 9, FF ¶18). Parties separated on May 20, 2015 (FF ¶20). A decree of dissolution was entered on November 18, 2016 (See Final Order).

Both husband and wife are natives of Russia born on the opposite ends of that country. (EX 124, RP 32). The husband arrived in the US in 2004 and worked at Microsoft for many years (RP 32, CP 86). The wife came in 2013 for a one year study program at Lake Washington Institute of Technology (EX 123, RP 165, CP 99, 101). They were introduced by a mutual acquaintance, a close friend of the wife's aunt, shortly after her arrival (RP 33-34).

Before marriage the husband had cache savings and stocks from his employer Microsoft (RP 196). The wife arrived on a student visa with \$25,000 that her parents gave her (RP 166). Her student visa required her to have funds to support her one year

study program (RP 167). The wife's student visa had standard employment constraints (RP 167-168).

In October 2014, after completing her college program, the wife obtained a one year work permit to practice in the field of her studies (CP 36). The wife became employed during marriage (RP 126, CP 108).

In May 2015, after 8 months of marriage, parties separated (FF ¶20). The husband asked the wife to file a joint petition for dissolution with the Consulate but she refused (RP 485). The husband filed for divorce in Russia in June 2015 (EX 14, RP 218, RP 470, RP 477<sup>1</sup>). In September 2015 the wife filed for a divorce in Washington (CP 3) and requested temporary maintenance because her visa no longer permitted her to work (CP 6, CP 16). The wife's work permit expired in October 2015 (RP 107, CP 16, CP 316).

The trial court entered a temporary order on November 6, 2015 awarding wife temporary maintenance in the amount of \$2,000 per month without an end date (CP 162).

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<sup>1</sup> RP 477:4-5 contains a mistake in the transcription. The sentence "Well, that's true" should read "while that's not true". See trial record on Nov 10 at 11:11:47 AM. The translation in Exhibit 14 mistakenly uses the word "annulment" instead of "divorce". See Exhibit 15, Russian original.

After this marriage the husband lost his job due to the severe psychological distress caused by the wife's litigation (RP 233). The husband received unemployment insurance benefits in connection with his loss of employment due to health issues (RP 233, RP 236). The husband applied for jobs in Washington but could not find employment. (CP 800, RP 238) The husband paid his state unemployment insurance benefits to wife and lived off his savings. On May 16, 2016 the husband finally found a new job in California.

After he started working again he paid rent in California \$2,195, mortgage and property tax in Washington ~\$2,000, and \$2,000 in maintenance to the wife (RP 253, RP 207). His car broke down and was no longer operable (CP 540). The husband's expenses exceeded his income and by the time of trial hearing he had \$35,000 in credit card debt (RP 259).

In June 2016, one year after separation, the husband asked the trial court to modify temporary order and relieve him from maintenance obligation (CP 538). The Commissioner declined to modify maintenance finding no change of circumstances (CP 571). By that time the husband's savings were largely depleted (CP 547).

He was no longer able to pay for representation and appeared pro se (CP 604).

On July 25, 2016 the Family Law Commissioner entered an order reserving July maintenance for the trial Judge's review in anticipation of the trial which at that time was scheduled for August 22, 2016 (CP 845). On August 12, 2016 at the husband's request the trial court postponed the trial from August 22 to September 12, 2016 (CP 894). Shortly after, on August 31, 2016 the trial court, on its own initiative, postponed the trial date an additional two months until November 7, 2016 (CP 1172).

On September 1, 2016, immediately after the Court's *sua sponte* delay of trial, the wife filed a motion to show cause seeking to hold the husband in contempt (CP 1182). On October 7, 2016 The Family Law Commissioner confirmed her earlier order which reserved the July maintenance for trial judge review; ordered a payment of \$2,000 (presumably for August), and reserved the maintenance resulting from the trial court's *sua sponte* delay of trial (additional two month) also for review by the Judge at trial (CP 1425).

Wife obtained employment authorization on October 4, 2016 (RP 116) and was employed on November 1, 2016 (RP 105, FF ¶13). Citing wife's visa limitation the trial court awarded \$6,000 of pre-trial maintenance reserved for review and an additional \$2,000 for the month of November (Final Order ¶6, FF ¶13). The trial court also awarded the wife \$20,000 in fees (Final Order ¶14, FF ¶14).

#### **IV. SUMMARY OF ARGUMENT**

The trial court completely failed to consider statutory factors before awarding maintenance. The parties are citizens of a foreign country. Wife's student visa limitation is not a statutory factor and is not relevant to this marriage. After short-term marriages courts should return the parties to their pre-marital economic positions.

The finding that the husband has ability to pay is not supported by substantial evidence. The trial court did not consider husband's significant credit card debt, actual net income or expenses related to his relocation to California for work. Husband's ability to incur more debt does not mean ability to pay.

The trial court failed to apply lodestar methodology in calculating reasonable attorney fees. The record is not adequate for

review of attorney fees. The trial court's findings do not support the reasonableness of awarding fees to compensate for one hundred hours of work.

The husband is not a native English speaker and requested an interpreter for trial. The husband never waived his right for an interpreter. A party's self-report of perceived language limitations related to the expressed request for an interpreter is not testimony, but of procedural nature and is not subject to determination of credibility. The trial court erred as a matter of law in failing to provide an interpreter on the day of the trial court's ruling.

## **V. LEGAL ARGUMENT**

### **A. The Trial Court Abused Its Discretion In Awarding Wife Maintenance Based Only On Wife's Visa Status Without Fairly Considering Other Factors.**

This court reviews the trial court's award of maintenance for abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). An award of maintenance that is not based on a fair consideration of the statutory factors constitutes an abuse of discretion. *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996). The only limitation on amount and

duration of maintenance under RCW 26.09.090 is that, in light of relevant factors, the award must be just. *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990).

RCW 26.09.090 governs the award of maintenance. This statute lists the factors that a trial court must consider in determining the amount of maintenance including: a) the financial resources of the party seeking maintenance; b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skills, interests, style of life, and other circumstances; c) the standard of living enjoyed during the marriage; d) the duration of the marriage; e) the age and physical and emotional condition of the party seeking maintenance; f) and the ability of the party from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the party seeking maintenance.

RCW 26.09.090 does not provide that one spouse's visa limitation under federal immigration law requires the other spouse to pay spousal support. “[A]lthough the statutory factors are not exclusive, a trial court cannot rely solely on a nonstatutory factor in making a maintenance determination without also fairly considering

the statutory factors. In re Marriage of Khan 182 Wn. App. 795; 332 P.3d 1016 (2014) (quoting In re Marriage of Spreen, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001)).

In this case the trial court awarded 13 months of spousal maintenance, after an 8 months marriage, without giving any consideration to statutory factors whatsoever. The only factor the trial court considered was the wife's lack of government permit to work in the United States, which was a consequence of her student visa status: "[t]he wife was unable to work because of visa limitations until just before trial" (FF ¶13).

The purpose of spousal maintenance is to help support a spouse until he or she is able to become self-supporting. In re Marriage of Irwin, 64 Wn. App. 38, 55, 822 P.2d 797 (1992); In re Marriage of Luckey, 73 Wn. App. 201, 209, 868 P.2d 189 (1994).

The parties are Russian citizens with close ties to their homeland and to parents who live in Russia. Both have master's degrees and neither party is a refugee (CP 24, CP 234). There is no implied expectation that after the marriage the couple must necessarily live in the United States. The wife arrived on a non-immigrant visa for the purpose of studying (RP 165). After completing her studies she



could go back to Russia where she could work, but instead she chose to become a burden on her former spouse.

Of paramount importance here, is the distinction that wife came to this country on a student visa (EX 123), met her husband while in a student status, her status did not change during the marriage, she was in a student status when the parties separated, and she remained in a student status several more months until her visa status expectedly expired (CP 108, CP 151). Soon after the separation the husband filed for divorce in Russia where the marriage was registered. The wife refused to divorce until her visa and work permit expired. Only then did she file for a dissolution and requested temporary maintenance.

In contrast to this case, there are two other types of cases where immigration status is integral to the marriage: a) wife enters the United States specifically for marriage on a fiancé visa; (See Khan, supra) b) the couple is already married when they enter the United States. In both of these cases one spouse may be responsible for supporting the other spouse in connection with the immigration. But the case on review is decisively different because

the parties learned of one another only after they both independently arrived to the United States.

In this case the marriage lasted eight months, but the trial court's findings may be equally applied to a marriage of eight weeks or even eight days. In a hypothetical scenario, an individual, whose visa is about to expire, gets married and files for dissolution soon after, she then petitions the court for an order of support pending trial, which is typically a year in the future. Such foreign national, in collusion with a US attorney, "hacks" the legal system and profits from despoiling the separate assets of her spouse collecting maintenance and property.

An award of maintenance based on the single factor of wife's pre-existing visa limitation is a legal loophole and in the context of an extremely short marriage is a policy that favors con-artists and swindlers. The trial court abused its discretion in failing to give a fair consideration to all statutory factors.

Here, the statutory factors weigh heavily in favor of little or no maintenance. Wife is 31 years old and has no financial obligations or adverse medical conditions. She was awarded all of community property. The marriage was very short in duration. No

standard of living was attained during the marriage of eight months. There is nothing to suggest that wife sacrificed any employment or educational opportunities during the marriage, on the contrary, she graduated from a college program and became employed during the marriage. As her parent's dependent, the wife had no assets and did not pool resources (RP 166). Neither was there any community endeavor to which she contributed.

The total amount reserved for review at trial was \$6,000 (the months of July, September and October 2016). The trial court abused its discretion in awarding maintenance for the months previously reserved for review at trial, having postponed the trial *sua sponte*. The trial court abused its discretion in awarding maintenance for the month of November when the wife was already employed.

The total award of \$8,000 of maintenance based on a single nonstatutory factor of wife's visa limitation and without giving consideration to RCW 26.09.090 factors, constitutes abuse of discretion and should be reversed.

**B. Substantial Evidence Does Not Support The Trial Court's Findings That Wife Has The Need Or That Husband Has The Ability To Pay.**

This court reviews the trial court's findings under a substantial evidence standard. Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 640, 201 P.3d 346 (2009). Evidence is substantial if it is sufficient to persuade a fair-minded person of the truth of the asserted premise. Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009). This court upholds the trial court findings if they are supported by substantial evidence. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).

Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). An appellate court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." Greene, 97 Wn. App. at 714.

Before marriage, the husband had been a productive and independent member of society, and his credit history afforded him

a substantial credit line and a mortgage loan. After moving to California the husband's expenses exceeded his income (RP 253, CP 1375). The trial court abused its discretion in failing to consider husband's credit card debt, the actual net income and expenses.

The record does not support the court's finding that the husband has ability to pay without incurring additional debt. The trial court's unconditional finding of husband's ability to pay equates ability to pay with his ability to incur debt. The husband's Financial Declaration, bank statements, paystubs and testimony at trial all indicate that husband's expenses exceed his income and do not support the finding of husband's ability to pay.

The finding of wife's need is not supported by substantial evidence either. The wife's bank statements indicate monthly deposits in the amount of over \$3,000 (EX 142). The wife's history in the United States begins with her arrival with \$25,000 as a dependent of her parents. In her earlier declarations the wife said that her parents do not have money to support her, but at trial she testified that her parents have been sending her money (CP 141, RP 122). The wife's relatives testified that they provided her with

months of rent-free accommodation (RP 98). This evidence cannot persuade a fair minded person that the wife is in need.

The trial court's focus on the husband's gross yearly income without a fair consideration of the money actually available to him cannot be a substitute for evidence of ability to pay. The husband's ability to meet his own financial obligation was extremely limited. His net income was \$6,886.24 as he continued to pay mortgage and property tax in Washington, paid rent in California, paid house and rent insurance and utilities, transportation and food (CP 550, CP 1330). The husband's credit card debt began to grow. In September 2016 this debt was close to \$25,000 (CP 1331). By the time of trial on November 7, 2016 husband's credit card debt was over \$35,000 (RP 259, CP 2102). Without taking an additional loan or otherwise increasing his debt the husband has no ability to pay.

As the goal of the court in short-term marriages should be to return the parties to the same economic condition they enjoyed at the inception of the marriage, (Washington Family Deskbook, Volume 2, §32.3(5), 32-17), it is an abuse of discretion for the trial court to award attorney fees and maintenance in such amounts that the husband is left with tens of thousands of dollars in debt.

Substantial evidence does not support the finding of husband's ability to pay without leaving him in debt and far worse than he was before the marriage of only eight months. Husband's ability to take on additional debt does not constitute ability to pay. Finding of wife's need, while her relatives supported her before and after the marriage to such degree that she paid all of the maintenance to her attorney, unjustly rewards the wife in this short marriage.

The record contains no evidence of sufficient quantity to persuade a fair-minded person that the husband has unconstrained ability to pay or that the wife has extreme need.

**C. The Trial Court Erred in Entering an Award of Attorney's Fee Without Including Appropriate Findings and Conclusions in the Record.**

A reasonable attorney fee award is calculated by applying the lodestar method. Mayer v. City of Seattle, 102 Wn. App. 66, 81, 10P.3d 408 (2000), review denied, 142 Wn.2d 1029, 21P.3d 1150 (2001). Under this method, the court multiplies the total number of attorney hours reasonably expended by the reasonable hourly rate of compensation. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675P.2d193 (1983); American Nursery v. Wells, 115 Wn.2d 217, 234, 797 P.2d 4 77 (1990) In some circumstances, the

court may adjust the lodestar fee upward or downward based on a consideration of additional factors. Scott Fetzer Co., Kirby Co., Div. v. Weeks, 114 Wn.2d 109, 124, 786 P.2d 265 (1990); RPC 1.5(a).

To withstand appeal, a fee award must be accompanied by findings of fact and conclusions of law to establish a record adequate for review. Mahler v. Szucs, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998); Eagle Point Condominium Owners Ass'n. v. Coy, 102 Wn. App. 697, 715, 9 P.3d 898 (2000). "Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record." Mayer v. City of Seattle, 102 Wn. App. 66, 82-83 (2000).

As this Court recently stated, the trial court "must do more than give lip service to the word 'reasonable.' The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." Berryman v. Metcalf, 177 Wn. App. 644, 658, 312 P.3d 745 (2013), review denied *sub nom*, Berryman v. Farmers Ins. Co., 179 Wn.2d 1026, 320 P.3d 718 (2014).

Further, any discussion of reasonable hourly rates must take into consideration the nature of the billing firm and the nature of the



work performed. West v. Port of Olympia, 146 Wn. App. 108, 123, 192 P.3d 926 (2008). The court of appeals explained that the type of work, rather than simply the resume of the attorney claiming fees, is relevant. Id.

Time spent on unsuccessful efforts in connection with otherwise successful claims is unproductive and must be excluded. Pham v. City of Seattle, 159 Wn.2d 527, 539-40, 151 P.3d 976 (2007).

After this careful review process, the court must support an award of attorney fees with specific findings of fact and conclusions of law. Mayer, supra. Those findings and conclusions must specifically address the challenged time entries and explain why they have been granted or denied. Id.

In *Berryman*, this Court rejected an attorney fee award in which the trial court simply filled in the blanks in the prevailing party's proposed order without examining the opposing party's objections. Berryman, 177 Wn. App. at 657. The *Berryman* court reiterated the *Mahler* admonition that trial courts must be active in evaluating fee requests and objections thereto, and remanded for entry of "meaningful" findings and conclusions. Id. at 677-78.

The trial court awarded to wife \$20,000 in attorney fees finding that “[s]ome, but not all, of the fees incurred by the petitioner were caused by the intransigence of respondent.” Unless severe misconduct permeates the entire case, one must show how specific intransigence caused additional fees and the trial court must segregate the fees resulting from the intransigence. Burrill, 113 Wn. App. at 873 (2002).

The trial court’s findings indicate that “[respondent] has been intransigent through his repeated, denied motions to terminate temporary maintenance as found by the Commissioners of the Family Law Department and through his continuous, contemptuous refusal to pay temporary maintenance”.

There were three motions to revoke maintenance in this case and four motions to show cause seeking to find husband in contempt for failing to pay maintenance. Attorney fees were previously awarded on these motions. Except for \$2,143.78, from the hearings on 10/7/2016 and 10/18/2016, the husband paid all of the previously awarded fees on the motions related to the trial court’s finding of intransigence. The husband also acknowledged at

trial that there was an unpaid balance of previously awarded fees (RP 45).

At the time the final order was entered the unpaid balance for all previous awards, with interest, was \$5,081.40 (RP 502), which includes the \$1,000 in connection to declaration of validity claim which was awarded subject to reallocation at trial (CP 509). The trial court found that “[a]ll fees and costs previously award [sic] by the Court in pre-trial orders are affirmed confirmed and incorporated into the \$20,000 total in fees”. The trial fee award then may be computed by subtracting the pre-trial awards from the total fees awarded, which gives the amount of \$14,918.60.

The wife’s attorney’s rate is \$150 per hour (CP 1421). Under the lodestar methodology this additional award of \$14,918.60 equals almost 100 hours of work or nearly 3 weeks. And even though the trial declined to award the wife’s excessive request for over \$33,000, the record does not explain how the trial court arrived at the award of \$14,918.60.

If the court makes an award, it must state on the record the method it used to calculate the award. In re Marriage of Knight, 75 Wn. App. 721, 729, 880 P.2d 71 (1994). In calculating a reasonable

amount of fees, the court should consider the following three factors: (1) the factual and legal questions involved; (2) the amount of time necessary for preparation and presentation of the case; and (3) the value and character of the property involved. In re Marriage of Foley, 84 Wn. App. 839, 846-47, 930 P.2d 929 (1997); Knight, 75 Wn. App. at 730.

In particular, the trial court found that “[t]his should have been a very straightforward case” (FF ¶14), that “the only real asset was the house” (FF ¶14), that “the house is and was the husband’s separate property” (FF ¶8) and that “[a]ll the closing documents are consistent with these findings” (FF ¶8).

The lodestar methodology can be supplemented based on the factors in RPC 1.5(a) as guidelines as to the reasonableness. “The trial court acted reasonably when it considered the factors set forth in RPC 1.5(a) in determining the amount of attorneys’ fees to be awarded”. Allard v. First Interstate Bank of Wash., 112 Wn.2d (1989). The RPC 1.5(a) factors include, among others, “[t]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly”.

The trial court's own findings speak against the novelty or difficulty of this case and do not support reasonableness of rewarding wife's attorney for the one hundred hours of work which was unnecessary and in pursuit of failed claims, such as characterization of the husband's house as community property, contrary to the RPC 1.5(a) guidelines.

Accordingly, the attorney fee award should be reversed and remanded for careful consideration of the relevant factors and to provide a meaningful record of the reasons for the amount of any attorney's fees awarded and an adequate basis for review.

**D. The Trial Court Abused Its Discretion When It Entered A Finding That The Husband's Need For An Interpreter Was Not Credible.**

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Bowen, 168 Wn. App. 581, 586-87, 279 P.3d 885, review denied, 176 Wn.2d 1009 (2012). The decision rests on untenable grounds if the factual findings are unsupported by the record; and it is based on

untenable reasons if it relies on an incorrect standard or the facts do not meet the requirements of the correct standard. Bowen, 168 Wn. App. at 586-87. This court uphold a trial court's findings of fact if substantial evidence supports them. In re Marriage of Bernard, 165 Wn.2d 895, 903, 204 P.3d 907 (2009). Evidence is substantial if it is sufficient to persuade a fair-minded person of the truth of the declared premise. Bernard, 165 Wn.2d at 903.

RCW 2.43.030(1) provides that “[w]henEVER an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.”

The husband requested an interpreter for trial because he is not a native English speaker and was not represented by a counsel (CP 965). The husband never provided a written waiver of his right to an interpreter pursuant to RCW 2.43.030(1). The trial court erred as a matter of law in failing to provide the interpreter. The trial court abused its discretion when it permitted substitution of exhibits (RP 525) in what was effectively an ex parte hearing because the

husband was not present in the court room and did not understand the proceeding over the phone (RP 524).

The trial court's finding of credibility rests on untenable grounds. The trial court abused its discretion because the factual findings are unsupported by the record. The court found that "[the husband] demonstrated during many hearings, and during trial, that his English was excellent" (FF ¶22). But the record does not support this finding. The husband appeared via counsel or an interpreter at all hearings preceding trial (CP 161, 284, 360, 280, 426, 507, 533, 602, 843, 1424, 1588, 1666).

Although the trial court's finding is flattering to the husband in regard to his English being "excellent" (FF ¶22), the husband self identified himself as non-native speaker with implied limitation related to all aspects of the English language such as reading, writing, speaking and listening, including vocabulary, grammar, idioms, cultural references, fluency and expressiveness as well as increased communication difficulty when using telephone or other equipment for technical reproduction of speech.

On November 18, 2016 the trial court did not provide an interpreter. At the onset of the hearing the husband informed the

court that he was not able to understand the proceeding without an interpreter (RP 524). The husband's self-report is procedural in nature and is not a testimony at trial (RP 526). As such it is not subject to court's assessment of credibility. The court's decision is manifestly unreasonable because the decision to make a finding of credibility of husband's self-report of his struggle to comprehend a foreign language is outside the range of acceptable choices.

Failure to provide an interpreter was an error as a matter of law. The substituted exhibits should be stricken from the trial record. The trial court's finding of credibility of husband's struggle to comprehend a foreign language should be reversed.

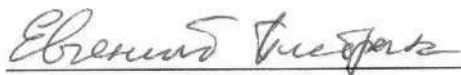
### **CONCLUSION**

This court should reverse the award of pre-trial maintenance and remand, directing the trial court to consider factors in RCW 26.09.090. The finding of need and ability to pay should be reversed and remanded for evaluation of all applicable evidence including credit card debt. The award of attorney fees should be remanded, directing the trial court to develop the record adequate for review. The finding of husband's credibility with respect to English language should be reversed.



DATED this 19<sup>th</sup> day of July, 2017

Respectfully submitted,

By:   
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